JP Anandam a/l Janardanan v Manoharan Malayalam

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S5-22–703 OF 2007
ASMABI MOHAMAD JC
26 MAY 2014

Legal Profession — Duty to client — Conduct of trial — Advocate and solicitor handled client's case against client's employer — Case regarding contract and tort of negligence — Petition filed by counsel on behalf of client due to failure to settle amount awarded pursuant to consent judgment — Whether facts pertaining to consent judgment entered into within client's knowledge — Whether consent judgment entered upon terms agreed between parties — Whether terms of consent judgment enforceable and inchoate

This was a claim by the plaintiff against the defendant, an advocate and solicitor in relation to matters arising from the latter's conduct in handling the plaintiff's case vide Civil Action No S5-22–372 of 1996 ('the Shah Alam suit') and the Winding Up Petition No D5-28–1047 of 2003 filed by the plaintiff against MAS at the Kuala Lumpur High Court ('the Petition'). The Shah Alam Suit was a claim filed by the plaintiff against his employer, Malaysian Airlines System ('MAS') and the Government of Malaysia, premised on the tort of negligence, for injuries sustained by the plaintiff whilst he was performing his duties as a senior passenger services officer with MAS at the Subang International Airport. The petition was filed by the defendant on behalf of the plaintiff to wind up MAS due to its failure to settle the amount awarded to the plaintiff pursuant to the consent judgment dated 15 October 2002. The defendant refuted the plaintiff's claim and alleged that the facts pertaining to the consent judgment entered into were well within the plaintiff's knowledge and the same was entered into after the plaintiff had fully understood the terms and consequences of the consent judgment. With regards to the petition, the defendant contended that the plaintiff fully understood the purpose, intent and consequences of the petition and had authorised the defendant to enter into such a claim against MAS as the plaintiff thought that was the only way he could pressure MAS to pay up the judgment sum. The issues to be tried were whether the plaintiff was properly advised by the defendant in respect of the terms of the consent judgment; whether the plaintiff knew and understood the consent judgment; whether the consent judgment was entered upon terms agreed between parties; and whether the terms of the consent judgment were enforceable and not inchoate; whether the plaintiff, in the circumstances of the case, was estopped from challenging the consent judgment; and whether the defendant had properly advised the plaintiff with regard to the filing of the petition against MAS and the consequences in doing so.

Held, dismissing the plaintiff's claim with costs:

(1) The court could not accept the plaintiff's evidence that after returning to the court room from the canteen what the defendant did was just walked, passed by and just said 'Accept! Accept!' without even bothering to find out from the plaintiff what had actually transpired during the negotiations. The court too could not accept the plaintiff's evidence that DW2 who was appointed by the plaintiff himself to be his co-counsel and his own nephew did nothing but to merely walk up and down the court room. The conduct of the defendant and DW2 as illustrated by the plaintiff was rather abnormal of reasonable counsel who were dealing with their client who had been instructed by the court to negotiate for settlement especially on the date the case was fixed for a continued hearing. It is highly improbable that the defendant and DW2 to have acted in the manner illustrated by the plaintiff (see para 86).

(2) The court accepted the defendant's version that the plaintiff was appraised of the terms of the consent judgment to be recorded before all parties entered into the trial judge's chambers. The plaintiff too understood what had transpired in the trial judge's chambers by the very fact that he had acted pursuant to that consent judgement to hand deliver the documents to MAS for verification by MAS for purpose of payment. With these factual matrix, the corroborated evidence of the defendant was more probable than the words of the plaintiff alone (see para 86).

(3) The conduct of the plaintiff to submit the documents personally to MAS for purposes of verifications by MAS before payment was made was consistent with the evidence of the defendant and DW2 that the plaintiff was well acquainted with the facts of the case. If that was not the reason, there was no purpose for the plaintiff to personally deliver the documents to the plaintiff. The defendant had discharged his burden of establishing what the defendant had done in this case was what a reasonable competent practitioner would have done to the standards normally adopted in his profession (see paras 87–88).

(4) Despite what was contended up to the time the case was heard, no attempts were made by the plaintiff to set aside and/or vary the said consent judgment. In fact the plaintiff had proceeded to execute the consent judgment by filing the bill of costs against MAS to tax the costs awarded to the plaintiff pursuant to the consent judgment. By reason of the plaintiff's conduct in taxing the costs awarded against MAS, the plaintiff was estopped from challenging the validity of the consent judgment. The plaintiff's attempt to raise this point at this late stage was an unconscionable and inequitable conduct. By filing the bill of costs, the plaintiff had clearly elected and obtained a benefit from the taxation of costs, in the form of the allocator awarded to the plaintiff (see para 89).

(5) The plaintiff had acted against advice and insisted that the defendant proceeded by way of winding up proceedings, as he believed that was the only way he could pressure MAS to pay up. The plaintiff had signed the petition. Therefore, the plaintiff being proficient in the English language would understand the words of the petition when he signed it. The plaintiff had the option to back out from the said winding up proceedings after the letter of allegation having been issued against him by MAS (see para 93).

(6) The evidence showed that the plaintiff had the benefit of the advice of three persons who testified in the court. The plaintiff's testimony that he did not know anything about the winding up proceedings could not be true in view of the testimony of the defendant supported by DW3 and further supported by DW2 who was appointed by the plaintiff to act in the best interest of the plaintiff in the conduct of the Shah Alam suit and matters related to that suit (see para 93).

[Bahasa Malaysia summary

Ini adalah satu tuntutan oleh plaintif terhadap defendan, seorang peguambela dan peguamcara berkaitan dengan perkara yang timbul daripada perlakuan pihak kedua dalam mengendalikan kes plaintif melalui Guaman Sivil No S5-22–372 Tahun 1996 ('guaman Shah Alam') dan Petisyen Penggulungan No D5-28–1047 Tahun 2003 difailkan oleh plaintif terhadap MAS di Mahkamah Tinggi Kuala Lumpur ('petisyen'). Guaman Shah Alam adalah tuntutan yang difailkan oleh plaintif terhadap majikannya, Malaysia Airlines System ('MAS) dan Kerajaan Malaysia, berdasarkan tort kecuaian, bagi kecederaan yang dialami oleh plaintif sementara dia telah melaksanakan tugasnya sebagai pegawai kanan perkhidmatan penumpang dengan MAS di Lapangan Terbang Antarabangsa Subang. Petisyen itu difailkan oleh defendan bagi pihak plaintif untuk menggulung MAS kerana gagal untuk menjelaskan jumlah yang diberikan kepada plaintif menurut penghakiman persetujuan bertarikh 15 Oktober 2002. Defendan menafikan tuntutan plaintif dan mendakwa bahawa fakta-fakta yang berkaitan untuk penghakiman persetujuan yang dimeterai adalah di dalam pengetahuan plaintif dan yang sama telah dibuat selepas plaintif telah memahami sepenuhnya terma dan akibat penghakiman persetujuan itu. Merujuk kepada petisyen itu, defendan berhujah bahawa plaintif memahami sepenuhnya tujuan, niat dan akibat petisyen itu dan telah membenarkan defendan untuk membuat apa-apa tuntutan terhadap MAS sebagai plaintif berpendapat bahawa adalah satu-satunya cara dia boleh memberi tekanan kepada MAS membayar jumlah penghakiman. Isu-isu untuk dibicarakan telah sama ada plaintif telah betul dinasihatkan oleh defendan berkenaan dengan terma penghakiman persetujuan itu; sama ada plaintif tahu dan memahami penghakiman persetujuan itu; sama ada penghakiman persetujuan itu dibuat atas terma yang dipersetujui antara pihak-pihak; dan sama ada terma penghakiman persetujuan itu ialah

dikuatkuasakan dan sudah lengkap; sama ada plaintif, dalam hal keadaan kes itu, telah diestop daripada mencabar penghakiman persetujuan itu; dan sama ada defendan telah dengan betul dinasihatkan oleh plaintif berkenaan dengan pemfailan petisyen terhadap MAS dan akibat dalam berbuat demikian. A

Diputuskan, menolak tuntutan plaintiff dengan kos: B

(1) Mahkamah tidak boleh menerima keterangan plaintif bahawa selepas kembali ke kamar mahkamah dari kantin apa defendan lakukan ialah hanya berjalan, melepasi dan hanya berkata 'Terima! Terima!' tanpa mengganggu untuk mengetahui daripada plaintif apa yang sebenarnya telah berlaku semasa rundingan. Mahkamah juga tidak boleh menerima keterangan plaintif bahawa DW2 yang telah dilantik oleh plaintif sendiri untuk bersama peguam dan anak saudaranya sendiri tidak melakukan apa-apa tetapi semata-mata untuk berjalan atas dan ke bawah di dalam bilik mahkamah. Kelakuan defendan dan DW2 seperti yang digambarkan oleh plaintif tidak normal peguam yang munasabah yang telah berurusan dengan pelanggan mereka yang telah diarahkan oleh mahkamah untuk berunding untuk penyelesaian terutama pada tarikh kes itu ditetapkan untuk perbicaraan yang berterusan. Ianya sangat tidak mungkin bahawa defendan dan DW2 untuk bertindak mengikut cara yang ditunjukkan oleh plaintif (lihat perenggan 86). C D E

(2) Mahkamah menerima versi defendan bahawa plaintif telah menilai terma-tema penghakiman persetujuan untuk direkodkan sebelum kesemua pihak memasuki kamar hakim perbicaraan. Plaintif juga memahami apa yang telah berlaku di dalam kamar hakim perbicaraan dengan hakikat dia telah bertindak menurut penghakiman persetujuan untuk menyerahkan secara sendiri dokumen-dokumen itu kepada MAS untuk pengesahan oleh MAS bagi tujuan pembayaran. Dengan fakta matriks, dan keterangan sokongan defendan adalah lebih berkemungkinan daripada perkataan plaintif sahaja (lihat perenggan 86). F G

(3) Kelakuan plaintif mengemukakan dokumen-dokumen peribadi kepada MAS bagi tujuan pengesahan oleh MAS sebelum pembayaran dibuat adalah konsisten dengan keterangan defendan dan DW2 bahawa plaintif mengetahui fakta-fakta kes tersebut. Jika bukan kerana itu, tidak ada tujuan untuk plaintif secara peribadi menyerahkan dokumen-dokumen kepada plaintif. Defendan telah dilepaskan beban membuktikan apa yang defendan telah dilakukan dalam kes ini adalah apa yang boleh dilakukan oleh pengamal kompeten yang munasabah dengan standard biasanya diterima pakai dalam profesionnya (lihat perenggan 87–88). H I

(4) Walaupun apa yang telah dihujahkan sehingga masa yang kes itu didengar, tiada usaha telah dibuat oleh plaintif untuk mengetepikan dan/atau mengubah penghakiman persetujuan tersebut. Malah plaintif telah meneruskan untuk melaksanakan penghakiman persetujuan itu

dengan memfailkan bil kos terhadap MAS untuk mencukai kos yang diberikan kepada plaintif menurut penghakiman persetujuan itu. Disebabkan oleh kelakuan plaintif dalam mengenakan cukai atas kos yang diberikan olehnya terhadap MAS, plaintif telah diestop daripada mencabar kesahihan penghakiman persetujuan itu. Percubaan plaintif untuk menimbulkan perkara ini pada peringkat lewat ini adalah kelakuan yang tidak berhati perut dan tidak berekuiti. Dengan memfailkan bil kos, plaintif telah jelas memilih dan mendapat manfaat daripada penetapan kos, dalam bentuk peruntukan yang diberikan kepada plaintif (lihat perenggan 89).

(5) Plaintif telah bertindak bertentangan dengan nasihat dan menegaskan bahawa defendan berjalan melalui prosiding penggulungan, kerana beliau percaya satu-satunya cara dia boleh memberi tekanan kepada MAS untuk membayar. Plaintif telah menandatangani petisyen itu. Oleh itu, plaintif yang mahir dalam Bahasa Inggeris akan memahami perkataan petisyen itu pada semasa dia menandatanganinya. Plaintif mempunyai pilihan untuk menarik diri daripada prosiding penggulungan itu selepas surat dakwaan telah dikeluarkan terhadapnya oleh MAS (lihat perenggan 93).

(6) Keterangan yang menunjukkan bahawa plaintif mendapat manfaat daripada nasihat tiga orang yang memberi keterangan di mahkamah. Keterangan plaintif bahawa dia tidak tahu apa-apa tentang prosiding penggulungan tidak boleh menjadi benar memandangkan kesaksian defendan disokong oleh DW3 dan disokong oleh DW2 yang telah dilantik oleh plaintif untuk bertindak dalam kepentingan terbaik plaintif dalam pengendalian Guaman Shah Alam dan perkara-perkara yang berkaitan dengan saman itu (lihat perenggan 93).]

Cases referred to

Bousted Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Chong Kay Kong v Ching Tong & Ors [1967] 2 MLJ 31, FC (refd)

Eastern Enterprise Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)

Fong Maun Yee & Anor v Yoong Wong Ho Robert (practising under the name and style of Yoong & Co) [1997] LRC 138, CA (refd)

Gan Yook Chin & Anor v Lee Ing Chin (P) @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Groom v Crocker and Others [1938] 2 All ER 394, CA (refd)

Lamphier v Phipos (1883) 8 Car & P 475 (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)

Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp [1978] 3 All ER 571, Ch D (folld)

Phuah Beng Chooi @ Koh Kik Kee (P) & Ors v Koh Heng Jin @ Koh Heng Leong

& Ors [2007] 2 MLJ 458, HC (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253 (refd)
Swamy v Mattews & Anor [1967] 1 MLJ 142; [1967] 1 LNS 174 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)
Victor Cham & Anor v Loh Bee Tuan [2006] 5 MLJ 359 ; [2006] 3 CLJ 770, CA (refd)
Wiltopps (Asia) Ltd v Drew & Napier (sued as a firm & anor) [2000] 3 SLR 244, HC (refd)
Wong Kiong Hung & Anor v Chang Siew Lan (f) [2009] 4 MLJ 183; [2009] 3 CLJ 751, CA (refd)
Yong & Co v Wee Hood Teck Development Corporation [1984] 2 MLJ 39; [1984] 1 CLJ (Rep) 251 (refd)

Legislation referred to

Employees' Social Security Act 1969
Evidence Act 1950 s 101(1)

Christie Soosay Nathan (Mohamad Fakhzan bin Md Noor with him) (Christie Soosay Nathan & Assoc) for the plaintiff.
Yeoh Cho Kheong (Jason Tay with him) (Ranjit Singh & Yeoh) for the defendant.

Asmabi Mohamad JC:

INTRODUCTION

[1] This was a claim by the plaintiff against the defendant, Mr M Manoharan who was and is currently practising as an advocate and solicitor under the name and style of Messrs M Manoharan & Co. The defendant was being sued by the plaintiff in relation to matters arising from his conduct in handling the plaintiff's case vide Civil Action No S5-22–372 of 1996 at the Shah Alam High Court ('the Shah Alam Suit') and the the winding up petition No D5-28–1047 of 2003 filed by the plaintiff against MAS at the Kuala Lumpur High Court ('the petition').

[2] The Shah Alam suit was a claim filed by the plaintiff against his employer Malaysian Airlines System ('MAS') and the Government of Malaysia, premised on the tort of negligence, for injuries sustained by the plaintiff whilst he was performing his duties as a Senior Passenger Services Officer with MAS at the Subang International Airport. Whilst the petition was filed by, the defendant on behalf of the plaintiff to wind up MAS due to its failure to settle the amount awarded to the plaintiff pursuant to the consent judgment dated 15 October 2002.

[3] In essence, the plaintiff had founded his case against the defendant on negligence and breach of contract.

[4] The defendant refuted the plaintiff's claim and alleged that the facts pertaining to the consent judgment entered into on 15 October 2002 were well within the plaintiff's knowledge and the same was entered into after the plaintiff had fully understood the terms and consequences of the consent judgment. With regard to the petition, the defendant contended that the plaintiff fully understood the purpose, intent and consequences of the petition and had authorised the defendant to enter into such a claim against MAS as the plaintiff thought that was the only way he could pressure MAS to pay up the judgment sum.

[5] This case proceeded by way of a full hearing with three witnesses having testified for the plaintiff and three witnesses testified for the defendant.

[6] After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by both the learned counsels for the respective parties on 7 February 2014, I dismissed the plaintiff's claim against the defendant with costs. After a brief submissions on the issue of costs, I awarded cost in the sum of RM35,000 to the plaintiff.

[7] Aggrieved by the said decision the plaintiff appealed to the Court of Appeal against the whole of the said decision.

THE DOCUMENTS

[8] The relevant documents referred to in the course of this trial were as follows:

	Documents	Marked
(a)	bundle of pleadings	'A'
(b)	amended writ of summons	'A2'
(c)	amended defence	'A3'
(d)	common bundle of document (Part A)	'B'
(e)	common bundle of document Vol 1 (Part B)	'C1'
(f)	common bundle of document Vol 2 (Part B)	'C2'
(g)	common bundle of document Vol 3 (Part B)	'C3'
(h)	common bundle of document Vol 4 (Part B)	'C4'
(i)	common bundle of document Vol 5 (Part B)	'C5'
(j)	the plaintiff's supp bundle of document (Part B)	'C6'
(k)	common bundle of document Vol 1 (Part C)	'D1'
(l)	common bundle of document Vol 1 (Part C)	'D2'
(m)	issues to be tried	'E'
(n)	statement of agreed facts	'F'
(o)	the plaintiff's opening speech	'G'

ISSUES TO BE TRIED

[9] The issues to be tried can be summarised (see document marked as 'E') as follows:

(a) whether the plaintiff was properly advised by the defendant in respect of the terms of the consent judgment dated 15 October 2002;

(b) whether the plaintiff knew and understood the consent judgment dated 15 October 2002;

(c) whether the consent judgment was entered upon terms agreed between parties and whether the terms of the consent judgment were enforceable and not inchoate;

(d) whether the plaintiff, in the circumstances of the case, is estopped from challenging the consent judgment; and

(e) whether the defendant had properly advised the plaintiff with regard to the filing of the petition against MAS and the consequences in doing so.

THE TRIAL

[10] The trial lasted for 11 days with three witnesses having testified for the plaintiff and three witnesses testified for the defendant. The witnesses for the plaintiff were the plaintiff himself, JP Anandam s/o Janardanan previously a senior passenger services officer of MAS ('PW1'), Dr Anil Sivasankaran, the doctor who conducted a medical examination on the plaintiff ('PW2') and Mr Patrick Lee, the Senior Customer Services Manager of MAS ('PW3'). The witnesses for the defendant were the defendant, M Manoharan a/l Malayalam, an advocate who conducted the Shah Alam Suit and the petition for the plaintiff ('DW1'), Sandosh s/o J N Anandam, an advocate and the nephew of the plaintiff who was asked by the plaintiff to be the co-counsel to assist DW1 with the Shah Alam Suit ('DW2') and Srimurugan a/l Alagan, DW1's legal assistant ('DW3').

THE PLAINTIFF'S CASE

The Shah Alam Suit

[11] The plaintiff commenced his employment with MAS as a traffic clerk around July 1974. After a series of promotions, he was promoted to a senior passenger services officer sometime in August 1990 and remained in that post until his termination on 28 January 2005.

[12] On 9 April 1995, an African male by the name of Norman Mattox ('Mattox') boarded a flight from Cebu in Philippines to Kuala Lumpur for

onward connection to Narita Airport in Japan. Upon arrival at Narita Airport, Mattox was detained for suspicion of possessing a tampered American passport. He was then deported to Terminal 1 of Subang International Airport on 26 April 1995. Mattox was subsequently deported to Cebu, Philippines on 27 April 1995. On 28 April 1995, the Philippines authorities deported Mattox to Kuala Lumpur.

[13] On arrival from Cebu, Mattox was received by Benny John, the acting Senior Passenger Services Officer of MAS who later handed Mattox to the plaintiff together with Mattox's passport and flight ticket. An investigation was conducted by the representatives from the Embassy of the United States of America to ascertain the authenticity of Mattox's passport. The investigation conducted by the said embassy, which was disclosed to the Malaysian authorities showed that the passport Mattox was carrying with him did not belong to him. The passport was then seized and Mattox was handed to an immigration officer by the name of Bala who then placed Mattox in a detention room at the Immigration Office at Terminal 1 of the Subang International Airport.

[14] On 2 May 1995 pursuant to this incident, the plaintiff was instructed by one Zaini Rahmat, the Customer Services Manager of MAS to verify Mattox's nationality and his country of origin and to prepare a full report on the incident. Based on the enquiries made by the plaintiff, he was informed by the US Embassy the passport confiscated from Mattox had been 'photo substituted'.

[15] On 9 May 1995 at about 8.55am the plaintiff and his assistant one Diana Salleh were on duty at the immigration office at Subang International Airport to hand over the passports belonging to passengers travelling on flights from Karachi who required transit visas from the immigration authorities.

[16] Whilst the plaintiff was attending to the transit visas, he heard Mattox shouting at him. At that material time, Mattox was standing outside the detention room for male detainees, behind the desks of the immigration officers by the name of Aided bin Sani and Badrul Hisham. Mattox requested the plaintiff to return his passport. When the plaintiff informed Mattox that his passport had been seized by the American Embassy and advised Mattox to cooperate with the authorities, Mattox turned violent and started to attack and assault the plaintiff causing the plaintiff to suffer severe permanent injuries (for particulars of injuries see pp 8–9 of WSPW1 as well as in WSPW2 and Appendix 1–4 appended to it). As Mattox was bigger in size, no one around the plaintiff was able to offer any assistance and/or rescue the plaintiff from Mattox's attack. Mattox somehow relented after being persuaded to do so by Aided and Badrul.

[17] The plaintiff claimed the injuries sustained by him as a result of Mattox's continuous assault on him on the day in question was caused by the negligence of his employer, MAS and the Government of Malaysia.

[18] Around the later part of 1995, the plaintiff had consulted Messrs Karpal Singh & Co for legal advice and to probe the possibility of him instituting legal action against MAS and the Government of Malaysia for damages suffered by him as a result of Mattox's assault on his person. The plaintiff was advised by Messrs Karpal Singh & Co that he had a good cause of action for negligence against MAS and the Government of Malaysia. Relying on the said advice, the plaintiff then instructed Messrs Karpal & Co to commence legal action against MAS and the Government of Malaysia for negligence.

[19] On 13 December 1996 the writ of summons and statement of claim were filed by Messrs Karpal & Co at the Shah Alam High Court vide Civil Suit No 22–372 of 1996 (see pp 265–277 of 'C1' Vol 1). Both MAS and the Government of Malaysia were cited as the defendants in the Shah Alam suit. At the material time the defendant was employed as a legal assistant in Messrs Karpal Singh & Co.

[20] When the defendant left Messrs Karpal & Co to set up his own private practice, the plaintiff then instructed the defendant to take over the conduct of the matter from his previous solicitors.

[21] The case was fixed for hearing before His Lordship Justice KN Segara ('the trial judge') at the Shah Alam High Court on 24 April 2002 and later adjourned to 17 June 2002 for continued hearing (see p 104 of 'C1' Vol 1). On 17 June 2002 the defendant had requested for the postponement of the continued hearing as both parties were in the midst of negotiations. The matter was then adjourned to 18 July 2002 to enable the parties to try to resort to out of court settlement.

[22] Following from there the defendant had caused a letter dated 20 June 2002 to be sent to Messrs Aziz Zakaria Shaiful and Wan, the solicitors acting for MAS. In the said letter the defendant informed the solicitors of MAS that the plaintiff was willing to accept a sum of RM1m as full and final settlement of the claim (see pp 107–109 of 'C1' Vol 1). However, the plaintiff's proposal was rejected by MAS vide its solicitors letter dated 23 July 2002 (see p 111 of 'C1' Vol 1). As the matter could not be resolved, the case was rescheduled to 15 October 2002 for continued hearing.

The consent judgment dated 15 October 2002

[23] When the case was called up on 15 October 2002, the trial judge had stood down the matter for an hour to enable the respective parties to try to work out an out of court settlement. As soon as the matter was stood down by the trial judge the defendant, DW2, the solicitors for MAS and the federal counsel who was acting for the Government of Malaysia left the court room. The representatives of MAS, Melvin Khoo, Patrick Lee and Mohamad Rashid, then commenced negotiations with the defendant. As a result of the said negotiations MAS had agreed to pay the plaintiff compensation in the sum of RM250,000 as a final settlement without the plaintiff having to prove by way of supporting documents the actual medical expenses incurred by him. As soon as the defendant returned to the court room, the plaintiff told the defendant what had transpired during the negotiations, that MAS had agreed to pay the plaintiff the sum of RM250,000 as full and final settlement. Besides that, the plaintiff had also told the defendant, MAS had also agreed to pay the plaintiff all medical expenses incurred by the plaintiff, which MAS was contractually bound to pay.

[24] The plaintiff had also told the defendant that he was informed by the representatives of MAS that his present and future medical expenses as well as his travel benefits would still continue. The moment the defendant heard that MAS was agreeable to an amicable settlement and had agreed to pay the compensation to the plaintiff for the sum of RM250,000, the defendant told the plaintiff to accept the offer. No advice or opinion was given to the plaintiff on whether the compensation which MAS had agreed to pay commensurate the pain and suffering suffered by the plaintiff and/or whether he should renegotiate for better deals. The defendant was only keen to record the consent judgment on that day. Whilst all these were happening, his nephew who was co-counsel was walking up and down without saying a word to the plaintiff.

[25] With regard to the reimbursement of the plaintiff's medical expenses as well as his present and future medical expenses and travel benefits, the defendant had advised the plaintiff that these particulars were contractual matters between MAS and the plaintiff. Therefore, these terms need not be incorporated in the consent judgment. When the case was recalled, the defendant proceeded to address the trial judge and recorded the terms of the consent judgment without consulting the plaintiff (see p 329 of 'C1' Vol 1). As the plaintiff was seated some 24–25 feet away from the table learned counsel were seated he could not follow the proceedings in the said chambers. Therefore, he had no knowledge of the terms that were actually recorded by the trial judge.

[26] The trial judge too did not make any attempt to read out the terms loudly for those concerned to know the details of the terms recorded by the trial judge. It was only on 23 June 2003, the plaintiff had the full knowledge of the actual terms recorded when the said consent judgment was sent to him by way of a facsimile transmission from Patrick Lee, the Senior Customer Services Manager of MAS (see pp 112–113 of 'C1' Vol 1) that he realised what were recorded were not in accordance with the terms negotiated by him and/or wanted by him.

[27] Upon discovering that the consent judgment had a clause 'subject to verification of documents by MAS on the total sum payable for expenses incurred by the plaintiff' being inserted in it and the judgment sum awarded to him was not a clean RM250,000, the plaintiff proceeded to the defendant's office to clarify the issue. Further, the plaintiff was confused with the terms recorded on 15 October 2002, as the plaintiff was contractually entitled for the medical and hospital benefits. The purpose of the Shah Alam Suit was to claim for damages for whatever amount over and above what the plaintiff was contractually entitled to.

[28] In addition to that, the plaintiff had also queried the defendant as to reason the suit against the Government of Malaysia was withdrawn. The defendant had assured the plaintiff that the plaintiff would get the compensation up to the limit of RM250,000 despite what was recorded in the consent judgment (see p 4 of 'D1' Vol 1). As a follow up from the plaintiff's queries, the defendant had sent series of letters to MAS to demand payment. However, MAS did not take heed to the plaintiff's demands.

[29] Due to MAS's failure to make payment, the defendant had advised the plaintiff to commence the winding up proceedings, the purpose of which was only to pressure MAS to make payment. The plaintiff was under the impression it was a normal process to initiate a winding up proceeding to pressure MAS to settle the judgment sum. Further he knew, as the defendant was his solicitor, the defendant would be acting in his best interest. As such, he left his legal matters to be handled by the defendant professionally.

The 218 notice/ The petition for winding up

[30] The defendant had caused a notice under s 218 of the Companies Act 1965 to be served on MAS on 29 July 2003 ('the said 218 notice'). Pursuant to the said notice, MAS was given 21 days to pay the judgment sum of RM250,000 or be slammed with the petition (see p 120 of 'C1' Vol 1). Pursuant to the said 218 notice, Messrs Aziz Zakaria Shaiful and Wan, the solicitors acting for MAS had issued a letter dated 29 September 2002 to the defendant to hold the plaintiff responsible for any loss suffered by MAS in the

event the petition for winding up MAS was filed by the plaintiff. The plaintiff had no information about this letter until the disciplinary enquiry against him was initiated by MAS. It was only upon his request that the said letter was given to the plaintiff (see pp 124–125 of 'C1' Vol 1).

[31] The winding up petition filed by the defendant was struck out by the court with cost on 16 June 2004. The plaintiff was later slapped with the bill of costs of RM74,550 after being taxed by the court (see pp 998–1020 and pp 1021–1022 of 'C3' Vol 3). MAS then institute bankruptcy proceedings against the plaintiff (see pp 1023–1025 of 'C3' Vol 3).

[32] In relation, the petition the defendant had on his own volition and without authority caused a letter to be issued to MAS to threaten MAS of committal proceedings to be instituted against MAS. The plaintiff had no knowledge of all actions taken by the defendant because at the material times he was suffering constant pain and was under medication. There was no way that the plaintiff could find out about all these actions. The plaintiff had left it to the defendant to take charge of all legal matters arising from the Shah Alam Suit and the petition (full particulars of the matter could be seen at pp 129–133 of 'C1' Vol 1).

[33] With regard to the show cause letter issued by MAS against the plaintiff for initiating the petition, the plaintiff claimed that he was given 14 days to respond to the said letter (see pp 225–226 of 'C1' Vol 1). Upon receipt of the letter, the plaintiff forwarded the same to the defendant for further action. A reply prepared by the plaintiff and assisted by DW2 was sent to MAS on 27 January 2002 to answer to all charges levelled against him by MAS (see pp 1063–1064 of 'C3' Vol 3). Notwithstanding what was done, the plaintiff was found guilty on all charges levelled against him and he was subsequently terminated from MAS with immediate effect.

The conduct of the defendant

[34] The defendant had failed in his duty and was negligent in not giving proper advice with regard to the terms to be negotiated, agreed upon and incorporated in the consent judgment. The defendant had also caused the consent judgment to be entered in terms not authorised by the plaintiff and without taking into consideration of the severity of injuries sustained by the plaintiff. The defendant had also failed in his duties as solicitors to be present with the plaintiff whilst the terms were being negotiated and/or in not informing the plaintiff the details of the terms agreed by both parties before the consent judgment was entered on 15 October 2002.

[35] The defendant had also failed in his duty and was negligent in not giving the proper advice to the plaintiff on all legal matters relating to proceedings for winding up. The defendant had caused the said 218 notice to be issued against MAS without informing the plaintiff of its implications. The defendant too had failed to advise the plaintiff on the best option for the plaintiff to execute the consent judgment. As a result of the defendant's negligence and/or breach of contract, the plaintiff suffered severe loss including his termination from MAS. The particulars of negligence and breach of contract, on the part of the defendant were as illustrated in the plaintiff's amended statement of claim and reiterated in Q & A 19 of his WS PW1.

Relief sought by the plaintiff

[36] Therefore the plaintiff sought, amongst others, the following damages from the defendant:

(a) RM1,000,000 damages for loss of compensation for pain and suffering;

(b) the sum of RM119,510 being his loss of salary calculated from February 2005 until his retirement at the end of March 2008;

(c) loss of EPF contribution being the sum of RM495 per month from February 2005 to the end of March 2008, the total of which was RM18,810;

(d) loss of gratuity of approximately RM6,000;

(e) loss of medical subsidy in the sum of RM300 per year, the total of which was RM1,200;

(f) loss of 'Bayaran Khas' being payment made by MAS to its employee on a yearly basis, the total of which was RM12,580;

(g) claims of overtime approximately RM229,500;

(h) loss of payment on public holiday who worked on 'shift duty' in the sum of RM25,211.60;

(i) meal allowance amounting to RM23,100; and

(j) loss of medical, transport costs, legal fees and nursing care amounting to RM114,504.50.

(The details of the claims are as stated in Q & A 20 of WSPW1 and supported by the documents attached therein).

CASE FOR THE DEFENDANT

The conduct of the Shah Alam Suit by the defendant

[37] The defendant admitted that the Shah Alam Suit was initiated by Messrs Karpal Singh & Co, the previous firm he was working for. The defendant met the plaintiff whilst he was working at the said firm. The defendant was not involved with the drafting of the Shah Alam Suit. However, whilst working at the said firm he had on a few occasions assisted Mr Karpal, who was handling the matter by attending court for case management. Due to this, the defendant had some background knowledge about the case. When the defendant left Messrs Karpal & Co to start his own private practice, the plaintiff had approached the defendant on numerous occasions to persuade the defendant to take over the conduct of the matter from Messrs Karpal Singh & Co. The defendant was reluctant at first as the matter was personally handled by Mr Karpal, his former employer and mentor.

[38] Further, it had come to his knowledge that the plaintiff had accepted compensation paid under the Employees' Social Security Act 1969 ('SOCSO Act'). It was only on or around June 2001, the defendant finally agreed to take over the conduct of the Shah Alam Suit from Messrs Karpal & Co. However, the defendant did not handle the matter alone as the plaintiff had appointed his nephew, Sandosh Anandam ('DW3') to assist the defendant as his co-counsel.

[39] Upon taking over the conduct of the matter, the defendant had reviewed the case and was of the opinion the plaintiff had an uphill task to prove his claim against the defendants in the Shah Alam suit as the plaintiff is prohibited by the SOCSO Act to pursue a claim for damages against his employer in court if he had accepted compensation under the SOCSO Act.

[40] Despite the above hurdle, the defendant proceeded to take steps to amend the plaintiff's pleading (see pp 265–277 of 'C1' Vol 1).

[41] The case was fixed for hearing on 24 April 2002. On this date whilst the plaintiff was still on the stand, the trial judge had directed the parties to the suit to try to work out an out of court settlement. At the material times, the trial judge was not happy and/or was annoyed with the manner, the plaintiff was giving his evidence-in-chief. The trial judge had in fact told both parties that the plaintiff had no cause of action against the defendants and requested MAS and the Government of Malaysia to look at the possibility of paying some ex-gratia payments to the plaintiff. As a result of that, the case was adjourned to 17 June 2002 for continued hearing.

[42] On 17 June 2002, the plaintiff had instructed the defendant to request for an adjournment to enable parties to the suit to try to resolve the matter amicably. In view of this, the case was then adjourned to the 18 July 2002. The defendant had caused a letter to be written to MAS to propose a figure of RM1m as full and final settlement (see pp 107–109 of 'C1', Vol 1).This offer

was turned down by MAS vide its solicitor's letter dated 23 July 2002 (see pp 111 of 'C1' Vol 1). As the defendant had, another matter fixed for continued hearing at the Malacca High Court on 18 July 2002, the trial judge had allowed the defendant's request for postponement and rescheduled the hearing to 15 October 2002.

Events leading to the consent judgment being recorded

[43] On 15 October 2002 before the hearing commenced, the trial judge had again directed all parties to try to resolve the matter. This time the trial judge had requested the respective parties to the action to try resolve the matter without interference from the respective counsels. The matter was then stood down for about an hour to enable parties to negotiate for settlement. Both the defendant and Sandosh, and learned counsel for the MAS and the federal counsel who was acting for the Government of Malaysia left the court room and returned to the court room an hour later. By which time all parties concern had already concluded their negotiations.

[44] As soon as the defendant met the plaintiff, the plaintiff informed the defendant, MAS was willing to pay RM250,000 to the plaintiff for all expenses incurred provided that the plaintiff was able to prove by way of supporting documents the actual expenses incurred by him. At this point the defendant had asked the plaintiff if he had all the supporting documents with him to prove his actual expenses of RM250,000. The plaintiff told the defendant and his co-counsel Sandosh not to worry because he had all these documents with him not only for RM250,000 which MAS agreed to pay but over and above the said figure.

[45] With regard to the suit against the Government of Malaysia, cited as the second defendant in the Shah Alam Suit, the plaintiff told the defendant and Sandosh that if the suit was settled by MAS he was willing to withdraw his suit against the Government of Malaysia.

[46] Soon after that the defendant, Sandosh together with the plaintiff entered the trial judge's chambers to record the terms of the settlement. They were followed by the solicitors for MAS, Major A Shafie Abdul Manas, Mohd Asnawi, the federal counsel who was acting for the Government Malaysia, and the representatives from MAS, Mohamad Rashid bin Abdul Rahman and Melvin Rajoo. In the trial judge's chambers, the defendant merely echoed the terms of settlement, which were dictated to him by the plaintiff. As the learned trial judge was recording the terms, the trial judge read out those terms loudly so that all present in the said chambers could follow the terms of the consent judgment to be recorded. After being satisfied that all parties understood those terms, the trial judge had requested both parties to the suit to confirm what was

recorded. The plaintiff, the representatives of MAS and the federal counsel representing the Government of Malaysia confirmed the terms that were recorded were in accordance with the terms agreed upon by all parties to the consent judgment.

[47] At that point, in time the plaintiff was fully aware of the intent and purport of the consent judgment. The plaintiff was also appraised by the defendant of his chances of succeeding in the Shah Alam Suit in view of the hurdle in the SOCSO Act. The plaintiff had informed the defendant he was willing to accept the figure of RM250,000 as settlement sum because he had with him all the required supporting documents. Further, the plaintiff had also submitted to the defendant all the required documents at the time parties were making attempts to settle the matter prior to 15 October 2002. The defendant believed the plaintiff had all the documents and would have no problem in proving his actual expenses based on the assurances given by the plaintiff himself. The plaintiff being proficient in the English language could follow the proceedings and understood the terms of the consent judgment (see pp 328–329 of 'C1' Vol 1). The learned trial judge did not record word for word every step taken by him to record the consent judgment. However according to the defendant, the learned trial judge had done what was necessary and reasonable and had taken all reasonable steps in ensuring that the parties present before the trial judge understood the words and effects of the consent judgment.

[48] The defendant had discussed with the plaintiff all the terms to be recorded before entering into the trial judge's chambers. When the defendant addressed the trial judge, he had merely echoed to the trial judge what was dictated to him by the plaintiff. Therefore at the time the terms of the consent judgment were recorded by trial judge the plaintiff knew and understood the terms of the consent judgment. The plaintiff had also the benefit of having his own nephew as his co-counsel to countercheck those terms to ensure that his interest was well protected and to advise him on whether the plaintiff should accept the offer of settlement from MAS on those terms. The proceedings which took place in the trial judge's chamber were as reflected in the notes of evidence dated 15 October 2002 (see pp 308–330 of 'C1' Vol 1).

[49] As the defendant viewed the plaintiff's case as a weak one in view of the SOCSO issue as discussed above, the defendant was of the view the sum offered by MAS was fair and reasonable. Further the plaintiff had given the assurance that he had all the required supporting documents to be verified by MAS to justify the payment of RM250,000. These supporting documents were already in the plaintiff's possession at the time he instructed Messrs Karpal Singh & Co to commence the suit against MAS and the Government of Malaysia. The same documents were also handed to the defendant to justify the plaintiff's offer of

settlement of RM1m which was rejected by MAS (see pp 729–731 of 'C2' Vol 2). With the above background at the back of his mind, the defendant saw it fit for the plaintiff to enter into the consent judgment rather than going through the agony of a full blown trial without any certainty of succeeding in the claim.

[50] As the terms were negotiated by the plaintiff himself, he was in a position to know the deal that he had struck with MAS. The defendant had also taken the liberty to explain to the plaintiff the terms of the consent judgment to be recorded by the trial judge. The plaintiff had full knowledge about the terms to be recorded and he too fully understood what had transpired during the negotiations with MAS's representatives who were his colleagues in MAS. In addition to that, the plaintiff had the benefit of the legal advice of his nephew whom he had appointed as his co-counsel to advise him on legal matters.

[51] The plaintiff's allegation that the defendant was negligent and/or had committed breach of contract could not be true. In fact, what was conveyed to the defendant by the plaintiff the minute the defendant approached the plaintiff after the one hour adjournment was that MAS was willing to pay the plaintiff subject to verification of documents to prove his actual expenses.

[52] The plaintiff's knowledge of the consent judgment was further supported by the fact that it was Sandosh, the co-counsel who had prepared the draft of the consent judgment to be submitted to the respective parties and the court for approval. It was Sandosh too who had prepared the fair copy of the consent judgment to be sealed by the court (see pp 668–670 of 'D2' Vol 2). The seal copy of the consent judgment was forwarded to the plaintiff and MAS on 6 March 2003 (see pp 112–113 of 'C1' Vol 1).

[53] The defendant's contention that the terms of the consent judgment were correctly recorded according to what was dictated to him by the plaintiff was further supported by the plaintiff's contemporaneous act in submitting the documents for purposes of verification by MAS personally. If it was not so why would the plaintiff take the trouble to hand deliver the supporting documents to the solicitors for MAS. However, the solicitors for MAS took a long time to respond to the plaintiff and/or to his solicitor and this had agitated the plaintiff.

Events leading to the 218 notice and the petition for winding up

[54] Until July 2003 the plaintiff had not received any respond from MAS, he then met with the defendant and his legal assistant Sri Murugan ('DW3') to discuss the possible steps to be taken to urge MAS to expedite payment of the damages awarded by the court pursuant to the consent judgment. During this time all the possible modes of execution and the winding up proceedings were

discussed by the defendant, Sandosh and the plaintiff. Each of the modes of execution, the pros and cons and the legal implications of each of the modes were discussed and explained to the plaintiff. The plaintiff was fully appraised of the execution and winding up proceedings.

[55] The plaintiff was agitated with the manner MAS was handling his claim and he was adamant to secure the payment of RM250,000 from MAS as soon as possible. After being appraised by both the plaintiff and DW3 of the various modes available to him the plaintiff felt there was only one way to pressure MAS to pay up, that is, by commencing the winding up proceedings against MAS.

[56] He was attracted to this idea of instituting the winding up proceedings to compel MAS to make payment. Despite the necessary advice having been given to the plaintiff of the seriousness of the winding up proceedings and the drastic procedures involved in the presentation of a winding up proceedings especially where it involved a national carrier, the plaintiff was adamant to proceed to this recourse. The plaintiff then instructed the defendant to initiate the winding up proceeding against MAS. As a result, of this the defendant issued the 218 notice pursuant to the Companies Act 1965 on 29 July 2003 (see p 120 of 'C1' Vol 1). MAS did not respond to this notice within 21 days provided by the law. It was only on 24 September 2003 the defendant's firm received payment for RM63,173.69 vide BCB cheque No 477062 (see pp 726 of 'C2' Vol 2). This payment was made known to the plaintiff who claimed that the amount was too small and instructed the defendant to reject the payment (see p 685 of 'D2' Vol 2). This letter was responded by the solicitors for MAS vide its letter dated 29 September 2003 (see p 124 of 'C1' Vol 1). MAS was willing to pay RM63,173.69 and nothing more as the plaintiff was not able to justify that he was entitled to be paid RM250,000.

[57] The plaintiff had instructed the defendant to proceed with the winding up proceedings around November 2003. However the same was struck out with costs by the Winding up court on 16 June 2004.

[58] As a result of the plaintiff's action in commencing the winding up proceedings against MAS, MAS had issued a notice to the plaintiff to show cause why disciplinary action should not be commenced against him vide notice dated 14 January 2004 giving the plaintiff 14 days to respond (see pp 225–226 of 'C1' Vol 1). With the assistance of his nephew, Sandosh, a reply to the show cause was issued vide a letter dated 20 February 2005 (see pp 230–232 of 'C1' Vol 1). The plaintiff was terminated from MAS with immediate effect after the disciplinary inquiry was conducted by MAS (see pp 227–229 of 'C1', Vol 1).

[59] All the events that took place which led to the plaintiff's termination from MAS had caused the relationship between the plaintiff and the defendant to be strained. This had led to a complaint being lodged against the defendant by the plaintiff to the Advocate & Solicitors Disciplinary Board (see pp 365–366 of 'C2' Vol 2). This complaint was dismissed by the said board vide its letter dated 21 October 2008 (see p 732 of 'C2' Vol 2). There was no appeal lodged by the plaintiff to the High Court.

[60] Based on the aforesaid, the defendant claimed that the plaintiff had not made out a case of negligence and/or breach of contract against him on the standard required by the law. Therefore, the plaintiff's claim ought to be dismissed by the court with costs.

BURDEN OF PROOF

[61] It is trite that the person who asserts the existence of certain facts must prove those facts exist (see s 101(1) of the Evidence Act 1950). In the Malaysian case of *Selvaduray v Chinniah* [1939] 1 MLJ 253, the court held that the onus of proof was on the plaintiff to prove his case and that, if the position at the conclusion of the trial being exactly even, the plaintiff had not discharged the onus which was on him and his action must fail.

[62] In the case of *Chong Kay Kong v Ching Tong & Ors* [1967] 2 MLJ 31, the Federal Court held that where the evidence on both sides was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, it is abundantly clear that the appellant had failed to discharge the onus of proof which rested on him as the plaintiff.

[63] In *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 Winslow J held at p 244 as follows:

> I accordingly find that the plaintiffs have not discharged the burden of proving a case against the defendant in the first placed.
>
> No burden accordingly shifts to the defendant ... *the defendant would not have to disprove something which has not been proved against him.* (Emphasis added.)

[64] The principles within which this court should be guided in disposing a case after a full trial had been laid down in a number of authorities. In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 ML J 229 for instant, His Lordship Chang Ming Tat FC said:

> Judicial reception of evidence requires that the oral evidence he critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[65] In *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 116–117 which was approved by the Federal Court in *Gan Yook Chin & Anor v Lee Ing Chin (P) @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 the court held:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence of a witness. *He must when deciding whether to accept or reject the evidence of a witness, test it against relevant criteria*. Thus, he must take into account the presence or absence of a motive that a witness may have in giving his evidence. *If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against probabilities of the case*. A trier of fact who makes findings based purely upon demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: *the approach to judicial appreciation of evidence is the same*. (Emphasis added.)

POINTS RAISED BY THE RESPECTIVE PARTY

For the plaintiff

[66] Learned counsel for the plaintiff had raised, amongst others, the following arguments:

(a) the defendant's contention that the trial judge had 'directed' a settlement be reached and for the respective counsel to stay away from the settlement negotiations could not be true as there was no evidence adduced by the defendant to support this contention. The trial judge could not have given such directions. If there were such directions surely the same would be reflected in the notes of evidence dated 15 October 2002. The defendant ought to have subpoenaed the trial judge to prove to the court those facts existed;

(b) there was no reason for the defendant and/or DW2 to be absent during negotiations that took place between the plaintiff and the representatives of MAS. If the plaintiff was able to negotiate on his own there would be no necessity for the plaintiff to appoint the defendant to act as his solicitor and/or to appoint DW2 to be his co-counsel. This was a clear case of abject dereliction of duty on the part of the defendant. If this was not negligence, the plaintiff could not find any apt words to describe the attitude of the defendant;

(c) there was no reason for the plaintiff to record the terms as stated in the consent judgment where the plaintiff was required to prove by way of documents the actual expenses incurred by him before payment could

be made by MAS. The plaintiff was a member of an Employees Union and he would be entitled to it anyway under the collective agreement with MAS;

(d) the claim in the Shah Alam suit was for pain and suffering. The defendant through his negligence had caused a mutation whereby the plaintiff lost all claims for pain and suffering due to the defendant's negligence. The defendant had also caused the plaintiff's unlimited entitlement to claims under the collective agreement for reimbursement of medical bills to be capped up to a maximum of RM250,000. This had caused the defendant to have a determining power and/or the upper hand in deciding the quantum to pay the plaintiff;

(e) the plaintiff could not be said to have agreed to the terms of the consent judgment. The consent judgment that was recorded which stipulated that the plaintiff was to be paid RM250,000 subject to verification of documents by MAS was definitely not in the best interest of the plaintiff. The terms recorded would have the effect that the plaintiff would be entitled to be paid to the maximum of RM250,000 but subject to verification of documents by MAS. The plaintiff could not have agreed to these terms as his benefits under the collective agreement would be over and above the said sum with no ceiling being defined and/or capped as stated in Item 16 of the said agreement (see pp 204–241 of 'D1' Vol 1);

(f) The defendant did not prepare or negligently prepared the plaintiff's case and/or the plaintiff for trial. The witness statement of the plaintiff that was prepared by the defendant was inconsistent with the documentary evidence tendered in court. When the contents of the witness statement itself contradicted the contents of the documentary evidence, how prepared could the plaintiff be. Due to the defendant's negligence, the plaintiff was not fully prepared for the *viva-voce* evidence in court. This reinforced the point that the defendant had not acted in the best interest of the plaintiff;

(g) the plaintiff had never authorised the clause 'tertakluk kepada pengesahan dokumen-dokumen oleh Defendan Pertama berkaitan dengan jumlah yang perlu dibayar untuk perbelanjaan yang dialami oleh Plaintif' to be incorporated in the consent judgment. As far as the plaintiff was concerned, it was supposed to be a done deal. The plaintiff could not hear what transpired in the trial judge's chambers as he was seated some 20–25 feet away from the trial judge and learned counsel for both parties. There was no confirmation sought from him by the trial judge to confirm the salient terms that were agreed to by the respective parties to the negotiations. Therefore, the consent judgment was not in accordance with what he wanted;

(h) the defendant had not addressed his mind to the clauses in the collective agreement. If he had done so, he would not have recorded the consent judgment in the manner it was done in this case;

(i) the defendant was confused as to the nature of the plaintiff's claim for pain and suffering. This confusion had translated into the confused, open-ended and inchoate consent judgment having been recorded on 15 October 2002;

(j) with regard to the plaintiff's failure to move the court to set aside or vary the consent judgment the plaintiff contended that it was impossible for the defendant not to have known that the plaintiff was unhappy with the terms of the consent judgment. Further, the plaintiff is a lay person he would not have known that the said consent judgment could be set aside and/or varied. In fact, there was no evidence adduced to show the defendant was making efforts to vary and/or set aside the said consent judgment. There was no way that the plaintiff's current solicitor could have moved the court to set aside and/or vary the consent judgment because by the time the current solicitor took over this matter limitation had already set in;

(k) the defendant and Sandosh did not advise the plaintiff with regards to the settlement proposal made by MAS. The plaintiff saw it fit to discuss the terms of settlement to be recorded before the trial judge with the defendant and Sandosh. However, both the defendant and Sandosh did not approach the plaintiff after the trial judge adjourned the matter for an hour for both parties to work out the settlement. In short, the plaintiff had no time to discuss the terms after the defendant and Sandosh came back from the court canteen as the case was recalled almost immediately after all learned counsel returned to the court room;

(l) the plaintiff claimed that he could not follow the proceedings in the trial judge's chambers as he was seated about 20–25 feet from the trial judge and learned counsel for the plaintiff and defendants. Further, the trial judge did not read out the terms of settlement to be recorded and/or asked him to confirm the terms;

(m) the plaintiff was prepared to accept the sum of RM250,000 as damages for pain and suffering. MAS had agreed to take care of all future medical and hospitalisation expenses, his privileges, annual privilege travel and that the plaintiff to be allowed to undertake light duties. However, these terms were not considered by the defendant and/or Sandosh. Hence, the consent judgment was not recorded in accordance with the plaintiff's wishes and what he wanted;

(n) with regard to the winding up proceedings, the plaintiff alleged that the plaintiff was a lay person where legal matters were concerned and had engaged the defendant to advise him on all legal matters in order to

protect the plaintiff's interest. Therefore how could the defendant even suggest such a drastic mode to be taken to compel MAS pay up the judgment sum, which was a disputed debt. It was obvious that the winding up was not a clear option opened to the plaintiff. Further how could a lay person know the winding up proceedings could have pressured MAS to make payment. In fact, it was the defendant who was of the opinion that winding up proceedings would be the best option to pressure MAS to pay up despite the disputed sum;

(o) the contention by the defendant that the plaintiff's claim against MAS was going to fall by reason the plaintiff had accepted the compensation under the SOCSO Act could not be raised as the same was not pleaded in the defendant's pleadings; and

(p) in relation to the quantum, the plaintiff is entitled to all the heads of claim under heading B. QUANTUM as submitted in the plaintiff's written submission (Document 1B) from pp 70–81.

Points raised by the defendant

[67] Learned counsel for the defendant, amongst others, raised the following submission:

(a) despite what was alleged, the plaintiff had not taken steps to set aside and/or vary the terms of the consent judgment. Instead, the plaintiff had proceeded to file for taxation of the bill of costs. This showed that the plaintiff had ratified the consent judgment. Further, the plaintiff could not approbate and reprobate. Estoppel would also work against the plaintiff;

(b) despite having contended that he did not know the terms of the consent judgment until he received the same from Patrick Lee dated 23 June 2003, the plaintiff had in fact confirmed that he had hand delivered the documents to MAS for purposes of verification. The plaintiff's act of delivering the documents personally proved that the plaintiff understood the terms of the consent judgment required the plaintiff to prove his actual expenses by way of document before the payment could be effected by MAS which was why the same was personally delivered to MAS. This was confirmed by MAS (see pp 114–116 of 'C1' Vol 1);

(c) the defendant had advised the plaintiff had an uphill task to defend his claim against MAS as the plaintiff had accepted payment pursuant to the SOCSO Act. Under the SOCSO Act once a person had accepted SOCSO benefits, he could not claim for any damages from his employer. This view was also shared by Sandosh, the plaintiff's nephew who had been appointed by the plaintiff as he co-counsel to protect his

interest. Even Sandosh was concern that the plaintiff having benefitted from SOCSO may be barred from pursuing his claim for damages in the Shah Alam suit;

(d) MAS had amended its defence to specifically plead that the plaintiff was not entitled to bring the Shah Alam suit against MAS. Hence, the defendant had in the course of preparation the plaintiff's case advised the plaintiff that the plaintiff had to overcome the relevant provision of the SOCSO Act, which prohibits a person who is insured under SOCSO Act to claim damages from his employer. Plaintiff was insured under SOCSO and he too had accepted the benefits under the SOCSO Act. Sandosh too shared the same views (see p 7 NOE 10; p 49 NOE 9);

(e) the trial did not go well for the plaintiff even during his evidence-in-chief. The trial judge was agitated and/or annoyed in the manner the plaintiff was giving his evidence-in-chief. Sandosh who was assisting the defendant testified that the progress of the case was rather slow. There were interruptions from the trial judge. The plaintiff did not seem confident in the witness box. He was rattling with the trial judge interjecting a few times. Sandosh was concern for the plaintiff (see p 51 NOE 9 on 10 June 2013). Despite having been cross-examined intensively by learned counsel for the plaintiff, sandosh maintained that the trial judge had even told the plaintiff that he did not have a good cause of action against the defendants. Such matters would not be reflected in the notes of evidence for obvious reason. The defendant and Sandosh had on oath testified this had taken place on the day in question;

(f) the trial judge had directed parties to attempt at settlement without interference from their counsels. The plaintiff had pleaded in his statement of claim that the trial judge directed all parties to work out an out of court settlement (see para 27 (a) at p 23 of 'A'; para 21.1 of the amended defence at p 65 of 'A'; statement of agreed fact document 'F'). Therefore, it was not disputed that the trial judge had in fact directed parties to resolve the matter as this point was pleaded in the plaintiff's pleadings and admitted in the defendant's pleadings. This was further reiterated in the statement of agreed facts. As the plaintiff had admitted this fact it does not lie in the hands of the plaintiff to lead evidence to show that there were no such directions by the trial judge. In any event, this issue, even if decided in the plaintiff's favour did not aid the plaintiff in any manner, as it did not represent the effective cause of the plaintiff's loss;

(g) the plaintiff contended that the defendant was negligent in leaving the plaintiff alone to commence negotiations with the defendants. The defendant further contended that the defendant ought to have assisted the plaintiff during the negotiations, as that was why the defendant was

retained as his solicitor in the first place, to take care of the plaintiff's interest. This contention could not be true as both the defendant and Sandosh had testified that they had discussion with the plaintiff the moment they stepped back in the court room before parties entered into the trial judge's chambers to record the terms of settlement agreed upon by the respective parties. The plaintiff had in fact informed the defendant and Sandosh, MAS was willing to settle the suit at RM250,000 subject to verification of documents (see Q & A 37 WSDW1; Q & A 16 WSDW2; p 76 NOE 10);

(h) Sandosh had asked the plaintiff in front of the plaintiff's wife whether he was prepared to settle the suit at RM250,000 being the maximum figure and whether he had the documents to prove actual expenses incurred up to that amount. Sandosh had also enquired about the position of the second defendant, the Government of Malaysia and the answer he got from the plaintiff was that he would not be pursuing against the Government of Malaysia if MAS agreed to settle the matter (see Q & A 37–41 of WSDW1; Q & A 17–20 of WSDW2);

(i) both the defendant and Sandosh had ensured that the plaintiff fully understood what he was in for before they entered into the trial judge's chambers to record the consent judgment (see pp 328–329 of 'C1' Vol 1; Q & A 14–17 of WSDW2). The terms were properly recorded by the trial judge who had ensured that the terms were read out aloud, understood and confirmed by the relevant parties to the consent judgment (see Q & A 44–46 of WSDW1; Q & A 23–25 of WSDW2). Sandosh had reiterated that all reasonable steps were taken by the trial judge to make the parties to the consent judgment understand and agreed to the terms to be recorded (see pp 108–111 NOE 10). Both the defendant and Sandosh testified that at most the plaintiff was only about 5–6 and/or 10–15 feet away from where the judge was seated and could follow the proceedings without much difficulty (see Q & A 16 (g) WSPW1; exh 'D8'; pp 103–107 NOE 10). As the documents were very important to ensure the plaintiff the fruits of the consent judgment, Sandosh reiterated that both the defendant and himself had asked the plaintiff if he had the documents for purposes of verification by MAS to substantiate his claim of RM250,000 to which the plaintiff answered in the affirmative. Both had ensured the plaintiff could support the payment of the RM250,000 (see pp 71 and 136 NOE 10);

(j) the draft consent judgment was in fact prepared by Sandosh in accordance with what was recorded by the trial judge and agreed by the respective parties (see pp 710–711 of 'C2' Vol 2; pp 328–329 of 'C1' Vol 1);

(k) the plaintiff's contention that the defendant failed to advise that the sum of RM250,000 was inadequate for the amount claimed for pain and suffering could not be sustained;

(l) the plaintiff's version of how the consent judgment was recorded could not be true as it was improbable that both counsels behaved in the manner described by the plaintiff, with one just walked passed by and said 'Accept! Accept!' and the other that was specifically appointed by the plaintiff himself to take care of the interest of the plaintiff, walking up and down without saying a word. This version as described by the plaintiff could not be true. The modes of recording consent judgment recorded by the trial judge could not be different from a normal reasonable court's practice in recording such judgments. This is an accepted standard practise by courts all over the country where the terms which would be binding on the parties to the consent judgment would be read out, understood and confirmed by the affected parties. Both the defendant and Sandosh confirmed this;

(m) the consent judgment is valid and enforceable, as the plaintiff had not set aside and/or applied to vary the said judgment. As the consent judgment had been entered, the cause of action of the plaintiff had merged with the consent judgment and ceases to exist. The plaintiff could not claim RM1m as compensation for pain and suffering;

(n) the plaintiff had gone ahead to tax the cost awarded in the consent judgment against MAS (see p 50, NOE 4). Therefore, the plaintiff is estopped from questioning the validity of the consent judgment. By his conduct to proceed with the taxation of costs showed that the plaintiff had ratified the consent judgment. Therefore, the plaintiff could not now challenge the terms of the consent judgment; and

(o) with regard to the petition, the evidence adduced during the trial would show that the plaintiff was properly advised, briefed, enlightened on the various modes of execution as well the winding up proceedings. The procedures, mechanism and legal impediments and implications of each of the modes were explained and fully understood by the plaintiff before he decided to commence winding up proceedings against MAS. All the defendant's witnesses were in unison and consistent with their testimony with regard to who was responsible for the winding up proceedings to have been instituted. Despite the advice by the defendant, Sandosh and Sri Murugan the plaintiff was persistent and adamant in initiating the winding up proceedings (see Q & A 17B, WSPW-1; Q & A 6 and 7 WSDW3; pp 640–643 of 'C2', Vol 2; Q & A 66 WSDW1; p 120 of 'C1', Vol 1; p 62, NOE 9, on 10 June 2013; pp 64–65 NOE 9, on 10 June 2013; p 225 of 'C1' Vol 1; p 13, NOE 3; p 535 of 'C2', Vol 2;

p 55 NOE 9, on 10 June 2013; p 72 NOE 9, on 10 June 2013). Therefore, the plaintiff could not now fault the defendant and/or Sandosh.

FINDINGS

The law

[68] A perusal of the amended statement of claim dated 1 April 2014 would show that the plaintiff had founded his claim against the defendant on the tort of negligence and breach of contractual duty. These two causes of action are so closely connected to each other. Therefore as a solicitor, the defendant could be liable in tort for negligence or in contract for breach of the contractual obligations. The defendant could also be liable for both of these causes of action. Therefore, both these causes of action could be dealt together. In *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359 at p 369; [2006] 3 CLJ 770 at p 781) the court held:

> It is settled law that a solicitor may be liable in contract in respect of breach of contractual duty as a solicitor and in the alternative he may be liable for in tort for negligence, independent of a contract as a professional man professing special skill who offer assistance to another and owed a duty of care to that other person who relied on his skill, (see *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126)

(see *Wong Kiong Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183 at p 191; [2009] 3 CLJ 751 at p 753)

[69] The relationship between the defendant and the plaintiff under the tort of negligence was that of a solicitor and client. This relationship gave rise to the defendant as solicitor to exercise duty of care and skill in giving advice to the client pertaining to all matters concerning the Shah Alam Suit, which the defendant knew that the plaintiff would rely on. As a solicitor, the defendant had a duty not to injure his client by failing to do all that he had undertaken to do and which was relied upon by his client.

[70] In order to succeed in a claim premised on the tort of negligence the plaintiff must prove:

(a) the defendant owed the plaintiff a duty of care;

(b) the defendant, as solicitor had breached that duty of care;

(c) the defendant's failure to exercise proper duty of care had caused the plaintiff to suffer damages; and

(d) the damage was not too remote as a consequence of the breach.

[71] In a claim premised under contract the defendant owed a contractual duty towards the plaintiff as the defendant was retained by the plaintiff to institute a civil action against MAS and the Government of Malaysia for negligence in relation to personal injuries suffered by the plaintiff and to advise the plaintiff accordingly on all legal matters connected thereto. In a cause of action premised on contract the plaintiff must prove:

(a) there existed a contractual relationship whether express or implied which imposed a contractual duty on the defendant as solicitor;

(b) the defendant had breached his contractual obligations towards the plaintiff;

(c) thereby causing the plaintiff to suffer damages; and

(d) the damage is not too remote a consequence of the breach.

(see *Wong Kiong Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183 at p 184; [2009] 3 CLJ 751 at p 753)

[72] In illustrating the duty of care imposed on the those in the legal profession, His Lordship Barakbah (LP) had applied the principle enunciated in the case of *Lamphier v Phipos* (1883) 8 Car & P 475 in the Federal Court case of *Swamy v Mattews & Anor* [1967] 1 MLJ 142; [1967] 1 LNS 174 (FC) and held:

> Every person who enters into learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, … nor does he undertake to use the highest degree of skill … but he undertakes to bring a fair, reasonable and competent degree of skill (see also Lord Fullerton in *Cooks v Falconer's Representative* [1850] 13D, p 157, at p 172).

[73] In *Groom v Crocker and Others* [1938] 2 All ER 394 at p 413 the court held that a solicitor should at least carry out his instructions in the matters to which the retainer relates by all proper means. He has a duty to consult his client on all questions of doubt, which do not fall in the express or implied discretion left to him. He shall also keep client informed to such an extent as may be reasonably necessary according to the same criteria.

[74] In *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; [1984] 1 CLJ (Rep) 251 (FC) held that there must be evidence on record for the court to conclude that the retainer came into existence by way of implication and being amplified by conduct of the parties which shows a course of dealings giving rise to legal obligations and thus establishing a solicitor-client relationship. Once this is established the normal terms of contractual relationship would apply. This contractual relationship would also include the duty to protect the interest of the client in matters to which the retainer relates

by all proper means. The retainer too had an obligation to consult his client on all questions of doubt which do not fall within the express or implied discretion left to the solicitor. The retainer too must keep his client informed to such an extent as may be necessary according to the same criteria.

[75] In *Fong Maun Yee & Anor v Yoong Wong Ho Robert (practising under the name and style of Yoong & Co)* [1997] LRC 138 Court of Appeal of Singapore held that the duty of a solicitor to his client is to verify instructions to act. The failure to do so gives rise to foreseeable risks that the solicitor would be acting without authority. What the solicitor should do is to confirm his authority to act and if he is unable to do then to caution the client of the risks he could be acting without authority. If the solicitor did not do so then he had not met with the standard of reasonably competent solicitor and is in breach of his duty of care and skill.

[76] The scope and duty of a solicitor are as spelt out in *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp* [1978] 3 All ER 571 as follows:

> No doubt the duties owed by a solicitor to his client are high in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interest, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselinck, Griffiths v Evans and Hall v Meyrick* demonstrate that the duty is directly related to the confines of the retainer.

[77] It is accepted now advocate and solicitor owe concurrent duties in contract and in tort. The duty is to exercise reasonable degree of care and skill as with all professions. A solicitor like the defendant in this case is to be judged by what reasonably competent practitioner would do although a lawyer is to be judged according to the standard of practitioners of his own standing and seniority.

Whether defendant was negligent/had breached his contractual obligations

[78] With the position of law as highlighted above in mind, I would now examine the factual matrix of this case to ascertain if the defendant had failed in his duty both in tort as well as in contract to entitle the plaintiff to the prayers sought by him in his amended statement of claim dated 1 April 2013. In order to do that this court would have to undertake to evaluate the evidence both testimonial as well as documentary placed before it by the respective parties. As

I had mentioned at the time the oral judgment was announced in open court on 7 February 2014, I have the uncorroborated evidence of the plaintiff on the one hand, who was the only witness who testified with regards to the handling of the Shah Alam Suit and/or the conduct of the said suit by the defendant from the time the conduct of the Shah Alam Suit was taken over by the defendant from the previous solicitor Messrs Karpal Singh & Co and events that took place subsequent to that. On the other hand, I had the evidence of the defendant, DW2 the nephew of the plaintiff and the co-counsel who had been specially appointed by the plaintiff to take care of the plaintiff's interest in the matter, as well as the evidence of DW3 who was the legal assistant of the defendant. I had also the benefit of observing the plaintiff for quite a number of days whilst he was in the stand, for almost six full days especially during cross-examination and re-examination. My personal observation of the plaintiff was that he appeared to me to be a very smart man, intelligent and a person who knew his rights and what he wanted out of the case. Despite reiterating that his level of education was only up to MCE, the plaintiff appeared to be a person who is very proficient in the English language. Besides that, I too had the opportunity of assessing the credibility of the plaintiff against the credibility of the defendant's witnesses before me.

[79] I had examined the evidence and had attempted to digest the facts before me as stated under heading the *case for the plaintiff* and the *case for the defendant* respectively. It was the plaintiff's contention that the defendant had acted without authority in entering into the consent judgment as recorded on 15 October 2002 (see pp 112–113 of 'C1' Vol 1). Further, it was also the contention of the plaintiff that the defendant had failed to be present to assist him with the negotiations for settlement. The plaintiff testified that both the defendant and his co-counsel DW2 had never advised him on whether the consent judgment ought to have been recorded in the terms that were recorded in this case. Despite his clear admission in his amended statement of claim, that there was direction given by the trial judge to initiate settlement of the case the plaintiff contended that there was no such direction given by the judge towards that direction. The plaintiff had also claimed that he knew nothing about what transpired in the judge's chambers on 15 October 2002 despite being present inside the trial judge's chambers and/or anything about the consent judgment until the same was faxed to him by Patrick Lee on 23 June 2003 (see pp 112–113 of 'C1' Vol 1).

[80] I had the evidence of the defendant about the events that took place prior to the day the consent judgment was recorded, the day the consent judgment was recorded and post judgment events. The evidence given by the defendant had been illustrated under the heading *case for the defence*. It was not disputed that DW2 was appointed by the plaintiff himself to be co-counsel acting for the plaintiff in the Shah Alam suit. DW2 who is the plaintiff's

nephew testified that the plaintiff was fully aware of the consent judgment and had never complained about the consent judgment. It was only later that he complained because MAS was not prepared to pay RM250,000 but only the sum of approximately RM70,000. It was highlighted during the trial that before the consent judgment was recorded both the defendant and DW2 had asked the plaintiff if the plaintiff had the necessary documents.

[81] The plaintiff's co-counsel, DW2 who is also the plaintiff's nephew testified that before the consent judgment was recorded by the trial judge he had in fact asked his uncle, the plaintiff, whether he had the bills and receipts for RM250,000 and the plaintiff had answered in the affirmative. DW2 further testified that he was present when the defendant asked the plaintiff if he had the documents to support the figure of RM250,000 and the plaintiff had confirmed to both DW2 and the defendant that he had the supporting documents to prove actual expenses incurred by him. DW2 had also testified that he had explained to his uncle the effect of the consent judgment and the need for the plaintiff to submit the documents to MAS for verification before payment was made and the plaintiff confirmed that he understood the intent, purport and effect of the consent judgment. The evidence disclosed that plaintiff had been notified by the defendant that MAS wanted the receipts and this was informed by the defendant to the plaintiff before all parties entered the trial judge's chambers and it was not a done deal as contended by the plaintiff during this trial.

[82] According to DW2, his uncle is an intelligent man and he should know the terms of the consent judgment to be recorded by the trial judge. It was also the testimony of DW2 that prior to the defendant taking over the conduct of the matter from Messrs Karpal & Co, the plaintiff had approached DW2 to review what was done by Messrs Karpal & Co. At that point in time, DW2 was shown the documents which relate to the expenses incurred by the plaintiff which DW2 had assisted the plaintiff to formulate. DW2 had run through all the documents in the plaintiff's possession which was then submitted to Messrs Karpal & Co for further action. The same documents were submitted to the defendant and filed for the purpose of the trial of the Shah Alam Suit. The plaintiff knew from the outset these were the documents required by MAS for purposes of verification. In short the decision to enter the consent judgment was made by the plaintiff himself after speaking to the defendant and DW2 and before all the respective parties went to the trial judge's chambers.

[83] Even before entering the trial judge's chambers DW2 confirmed that both DW2 and the defendant asked the plaintiff about the documents as DW2 was concerned. When the plaintiff confirmed that he had all the documents then DW2 was satisfied and the defendant, DW2 and the plaintiff entered the trial judge's chamber followed by learned counsel for MAS, the Government of

Malaysia as well as the representatives of MAS. Both the defendant and DW2 were subjected to intensive cross-examination by learned counsel for the plaintiff but they maintained that the plaintiff being an intelligent man was conscious and able to understand what transpired on the day in question which had led to the consent judgment having been recorded. It was clear in the plaintiff's mind that the judgment sum of RM250,000 was subject to verification of documents by MAS.

[84] The defendant's evidence with the regard to what had transpired in the trial judge's chambers was corroborated by the evidence of DW2. DW2 had also testified what transpired in the judge's chambers and related the manner the trial judge's recorded the terms of the consent judgment in detail in the presence of the plaintiff, the representatives of MAS, the respective counsel representing the parties in court. Briefly, DW2 informed the court that the trial judge did what was necessary to explain the terms of the consent judgment to all concerned and these terms were understood by those present. DW2 had also stated that all the steps that ought to have been taken by the trial judge in recording the consent judgment had actually taken place despite the same had not been recorded in verbatim by the trial judge. He reiterated that the trial judge had followed the correct procedure in recording the consent judgment. Therefore, the consent judgment reflected the intentions of all parties, including the intention of the plaintiff.

[85] The terms were agreed and confirmed by the respective learned counsel as shown in the notes of proceedings recorded by the trial judge (dated 10 June 2013, 'NOE 9'). DW2 further testified that he was the person responsible for the preparation of draft of the consent judgment to be faired, as the plaintiff had wanted to expedite the extraction of the fair copy of consent judgment to be forwarded to MAS for payment purposes (see pp 710–711 of 'C2' Vol 2). The consent judgment was drafted in accordance with the terms recorded in the notes of proceedings (see pp 328–329 of 'C1' Vol 1). It was only when MAS refused to make payment that the plaintiff had come to see DW2 in his office to discuss on how to execute the consent judgment. At this point in time the idea of instituting winding up proceedings was also discussed and considered by the plaintiff.

[86] This court could not accept the plaintiff's evidence that after returning to the court room from the canteen what the defendant did was just walked, passed by and just said to the plaintiff 'Accept! Accept!' without even bothering to find out from the plaintiff what had actually transpired during the negotiations. The court too could not accept the plaintiff's evidence that DW2 who was appointed by the plaintiff himself to be his co-counsel and his own nephew did nothing but to merely walk up and down the court room. The conduct of the defendant and DW2 as illustrated by the plaintiff was rather

abnormal of reasonable counsel who were dealing with their client who had been instructed by the court to negotiate for settlement especially on the date the case was fixed for a continued hearing. In the event the negotiations failed the effect would be the defendant and DW2 would have to conduct the trial before the trial judge on the same day. In view of this shouldn't the defendant and DW2 be interested in the outcome of the negotiations. It is highly improbable that the defendant and DW2 to have acted in the manner illustrated by the plaintiff. Therefore, I accepted the defendant's version that the plaintiff was appraised of the terms of the consent judgment to be recorded before all parties entered into the trial judge's chambers. The plaintiff too understood what had transpired in the trial judge's chambers by the very fact that he had acted pursuant to that consent judgment to hand deliver the documents to MAS for verification by MAS for purpose of payment. With these factual matrix before me the corroborated evidence of the defendant was more probable than the words of the plaintiff alone.

[87] Further, the conduct of the plaintiff to submit the documents personally to MAS on 10 December 2002 for purposes of verifications by MAS before payment is made is consistent with the evidence of the defendant and DW2 that the plaintiff was well acquainted with the facts of the case. If that was not the reason there was no purpose for the plaintiff to personally deliver the documents to the plaintiff (see pp 114–116 of 'C2' Vol 2).

[88] In view of the aforesaid and guided by the principles enunciated in the case of *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp* the defendant in this case should be judged by 'what a reasonable competent practitioner would do having regard to the standards normally adopted in his profession'. and he should not be judged by the standard of 'what a particular meticulous and conscientious practitioner would elect to do'. I have attempted to illustrate the evidence adduced by the defendant and supported by DW2 as well as the documentary evidence that were adduced and based on this evidence I am satisfied that the defendant had discharged his burden of establishing what the defendant had done in this case was what a reasonable competent practitioner would have done to the standards normally adopted in his profession.

Whether consent judgment still valid and effective

[89] Despite what was contended up to the time the case was heard before me, no attempts were made by the plaintiff to set aside and/or vary the said consent judgment. In fact the plaintiff had proceeded to execute the consent judgment by filing the bill of costs against MAS to tax the costs awarded to the plaintiff pursuant to the consent judgment (see p 50 NOE 4). By reason of the plaintiff's conduct in taxing the costs awarded against MAS, the plaintiff is

estopped from challenging the validity of the consent judgment. The plaintiff's attempt to raise this point at this late stage is an unconscionable and inequitable conduct (see *Bousted Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 348) By filing the bill of costs the plaintiff had clearly elected and obtained a benefit from the taxation of costs, in the form of the allocator awarded to the plaintiff.

[90] The said consent judgment remained effective and binding until set aside. Further, fresh proceedings must be commenced to set aside a consent judgment (see *Wiltopps (Asia) Ltd v Drew & Napier (sued as a firm & anor)* [2000] 3 SLR 244 at p 252). Therefore, the consent judgment is valid and effective till this date. The consent judgment is therefore binding and act as an estoppel (see *Phuah Beng Chooi @ Koh Kik Kee (P) & Ors v Koh Heng Jin @ Koh Heng Leong & Ors* [2007] 2 MLJ 458 at p 465).

Was the defendant negligent in causing the 218 notice and the petition to be issued

[91] The next issue for determination is that whether the defendant had caused the 218 notice and the winding up proceedings to be commenced against MAS without first consulting the plaintiff and/or without advising the plaintiff properly with regards to the process and effects and/or failed to advise the plaintiff on the legal implications of such a process. It was the contention of the plaintiff that the defendant's firm had issued the 218 notice without proper advice on the effects and consequence of such a recourse. The events leading to the issuance of the 218 notice and the winding up proceedings had been illustrated by the defendant, DW2 and DW3 respectively.

[92] The plaintiff was advised by the defendant on the various options opened to him to execute the consent judgment including the winding up proceedings. The plaintiff's own nephew testified that the plaintiff had come to him for second opinion on the execution and the winding up process. At the time the plaintiff sought DW2's second opinion the plaintiff informed DW2 that he had already sought the opinion of the defendant and DW3. DW2 had too had taken the trouble to explain to the plaintiff the steps that the plaintiff could take to cause MAS to effect payment. DW2 had also explained that he had taken the liberty to explain to the plaintiff all about the winding up proceedings. DW2 confirmed that the plaintiff had a clear understanding on the options opened to him to effect payment. DW2 too was surprised at the plaintiff's insistence to proceed by way of the winding up despite having understood the serious consequences which MAS had to go through should winding proceedings be commenced against it.

[93] The plaintiff had acted against advice and insisted that the defendant proceeded by way of winding up proceedings, as he believed that was the only

way he could pressure MAS to pay up. The plaintiff had signed the petition dated November 2003 (see p 535 of 'C2' Vol 2). Therefore, the plaintiff being proficient in the English language would understand the words of the petition as at November 2003 when he signed the petition (see p 535 of 'C2' Vol 2). The plaintiff had the option to back out from the said winding up proceedings after the letter of allegation having been issued against him by his employer, MAS. Notwithstanding the letter of allegations dated 14 January 2004 having been issued by MAS the plaintiff had written to MAS with the assistance of DW2 where, among others, he reiterated that he was pursuing with the petition. The gist of the said letter showed that the plaintiff was adamant to proceed by way of the petition against MAS. The plaintiff had also threatened MAS with contempt proceedings (see pp 1063–1064 of 'C3' Vol 3). The evidence showed that the plaintiff had the benefit of the advice of three persons who testified in court in the form of the defendant, DW2 and DW3. The plaintiff's testimony that he did not know anything about the winding up proceedings could not be true in view of the testimony of the defendant supported by DW3 and further supported by DW2 who was appointed by the plaintiff to act in the best interest of the plaintiff in the conduct of the Shah Alam suit and matters related to that suit.

[94] The letter dated 27 January 2004 (see pp 1063–1064 of 'C3' Vol 3) and supported by the evidence of DW2 proved that the plaintiff had the benefit of the advice of the defendant and DW3 on all issues pertaining to the winding up proceedings. The plaintiff had admitted in evidence vide the above mentioned letter that he had in fact told MAS to stay out and allow the winding up proceedings to proceed against him. That was how adamant the plaintiff was to make MAS pay up his money.

[95] Based on the aforesaid, the plaintiff's contention that the defendant was negligent and/or had breached his contractual duties as a solicitor acting for the plaintiff could not be sustained and ought to be dismissed by this court. Paragraph 88 above is repeated herein.

Answers to the issued posed for the court's determination

[96] In view of the aforesaid the issues which were posed for this court's determination must be answered in this manner:

(a) whether the plaintiff was properly advised by the defendant in respect of the terms of the consent judgment dated 15 October 2002 — answer in affirmative.

(b) whether the plaintiff knew and understood the consent judgment dated 15 October 2002 — answer in affirmative.

(c) whether the consent judgment was entered upon terms agreed between parties and whether the terms of the consent judgment were enforceable and not inchoate — answer in affirmative.

(d) whether the plaintiff, in the circumstances of the case, is estopped from challenging the consent judgment — Answer in affirmative.

(e) whether the defendant had properly advised the plaintiff with regard to the filing of the petition against MAS and the consequences in doing so — answer in affirmative.

CONCLUSION

[97] On the totality of the evidence adduced by the plaintiff and the defendants through their witnesses, both testimonial and documentary, and having evaluated the evidence I am satisfied the plaintiff had failed to discharge the onus of establishing his pleaded case against the defendant on the balance of probabilities. Hence, the plaintiff's claim is dismissed with costs. In arriving at the above decision, I had carefully considered the evidence adduced by the plaintiff and the defendant both testimonial as well as documentary, the submissions by both by the plaintiff as well as the defendants and the authorities tendered in support of their respective submissions.

[98] Lastly, I would like to express my sincere appreciation to both learned counsel who had diligently and professionally conducted the trial before me and assisted me with their well-researched submissions to enable me to decide this case.

Plaintiff's claim dismissed with costs.

Reported by Afiq Muhamad Noor